

Tran (Migration) [2023] AATA 3870 (14 November 2023)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANTS:	Mrs Kim Tham Tran Miss Trieu Vy Huynh Miss Y Nhi Huynh
REPRESENTATIVE:	Ms Thu Ha Nguyen (MARN: 0747622)
CASE NUMBER:	2005112
HOME AFFAIRS REFERENCE(S):	BCC2018/3523855
MEMBER:	Cheryl Cartwright
DATE:	14 November 2023
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal remits the applications for Partner (Temporary) (Class UK) visas, with the direction that the first named applicant meets the following criteria for a Subclass 820 (Partner) visa: • cl 820.211(2)(a) of Schedule 2 to the Regulations • cl 820.221 of Schedule 2 to the Regulations

Statement made on 14 November 2023 at 4:00pm

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner) – genuine and continuing relationship – validly married – financial, household and social aspects of relationship and nature of commitment – limited evidence at time of application – met while applicant still married to first husband and rapid development of relationship – duration of relationship, travel and interactions with each other’s family – joint finances and purchase of property – consistent oral evidence given independently – members of family unit – decision under review remitted

LEGISLATION

Migration Act 1958 (Cth), ss 5CB, 5F(2), 65

Migration Regulations 1994 (Cth), r 1.15A(3), Schedule 2, cls 820.211(2)(a), 820.221

CASES

He v MIBP [2017] FCAFC 206

Jayasinghe v MIMA [2006] FCA 1700

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs to refuse to grant the applicants Partner (Temporary) (Class UK) visas under s 65 of the *Migration Act 1958* (Cth) (the Act).
2. The first named applicant (the applicant) applied for the visa on 17 September 2018 on the basis of her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the applicant did not satisfy cl 820.211(2)(a) because there was insufficient evidence to demonstrate that the applicant is the spouse or de facto partner of the sponsor, as defined under sections 5F and 5CB of the *Migration Act*.
4. The applicants appeared before the Tribunal on 14 November 2023 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor Phu Hung Vo, and a daughter of the applicant, Y Nhi Huynh. The Tribunal hearing was conducted with the assistance of an interpreter in the Vietnamese and English languages.
5. The applicants were represented in relation to the review.
6. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. The issue in the present case is whether the applicant and the sponsor are spouses for the purposes of the Act.
8. As Middleton J stated in *Jayasinghe v MIMA* [2006] FCA 1700 at [35]:
 9. Evidence of events subsequent to the visa application is relevant if it 'tends logically to show the existence or non-existence of facts relevant to the issue to be determined': see *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 4 ALD 139 at 160 per Deane J. The Tribunal must consider all relevant evidence, which may include evidence of events subsequent to the date of application insofar as it assists in the task of determining whether the appellant and the sponsor were in a marriage relationship at the time of the application. The question of whether particular evidence is relevant and the weight it is to be given is clearly a matter for the Tribunal.
10. In deciding this matter, the Tribunal has also had regard to evidence of events subsequent to the date of the visa application and the date of the delegate's decision.
11. **Background**
12. The applicant and sponsor met in August 2017 at the home of the applicant's then husband's sister who is a friend of the sponsor. The applicant was staying at her sister-in-law's home

during her visit to Australia. She described her sister-in-law as the 'guardian' for her children who are studying in Australia. The applicant was married to her first husband, the father of her children, at the time of this meeting but she told the Tribunal that the marriage had been unhappy. Her first husband had not travelled to Australia with her at that time. They were formally divorced in January 2018.

13. The applicant and sponsor stayed in touch after their meeting and in June 2018 they decided to get married, moving to a rental home together in July 2018. They were married in August 2018 and lodged an application for a partner visa (820) in September 2018.
14. In July 2021 the parties bought a home together in Oakden Street St Albans. They live there with the applicant's two daughters from her previous marriage.

Whether the parties are in a spouse or de facto relationship

15. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen. A copy of the sponsor's Australian citizenship certificate dated 30 October 2017 is on the Department's file.
16. 'Spouse' is defined in s 5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s 5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in reg 1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in reg 1.15A(3) is effectively a question which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

17. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The parties were married at Hoppers Crossing on 18 April 2018. A copy of the marriage certificate is on the Department's file. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s 5F(2)(a).

Are the other requirements for a spouse relationship met?

18. Regulation 1.15A(3) provides relevant factors for determining whether the spousal relationship exists. These factors are (a) the financial aspects of the relationship; (b) the nature of the household; (c) the social aspects of the relationship; and (d) the nature of the persons' commitment to each other.
19. In considering these issues, the Tribunal has had regard to all of the documents on the Department's file and on the Tribunal's file.

20. *The financial aspects of the relationship*

21. Any joint ownership of real estate or other major assets, any joint liabilities, the extent of any pooling of financial resources, whether one person in the relationship owes any legal obligation in respect of the other and the basis of any sharing of day-to-day household expenses are relevant factors to consider when assessing the financial aspects of the relationship.
22. There is no evidence that one person in the relationship owes any legal obligation in respect of the other.
23. The parties provided evidence of a house purchased jointly in 2021. The house was valued at \$550,000 and the parties provided evidence of a mortgage for \$440,000 obtained with the Commonwealth Bank. In independent and consistent statements, the parties told the Tribunal hearing that a brother of the applicant had provided \$110,000 as a 'gift' for the deposit on the house.
24. The parties provided copies of statements for a joint bank account from 2019 to 2023. The statements show salary deposits for both parties, as well as expenditures on household items, social events, a deposit for the jointly purchased house and mortgage repayments.
25. The Tribunal asked the applicant why, as stated in the divorce documents, dated 4 January 2018, she had not requested maintenance payments from her former husband for herself and her children. The applicant told the hearing that she is independent and has her own resources.
26. The parties provided the Tribunal with copies of tax returns dating from 2019 to 2023, showing that each had declared the other as spouse, as well as utilities invoices in joint names for their shared rental home in Main Road St Albans and for their jointly purchased home in Oakden Street St Albans.
27. The Tribunal notes the lack of evidence of the financial aspects of the relationship provided at the time of application and gives little weight to the lack of evidence.
28. The Tribunal gives great weight to the evidence that the parties have purchased a home together and share responsibility for household expenses.
29. *The nature of the household*
30. Any joint responsibility for the care and support of children, the living arrangements of the persons and any sharing of the responsibility for housework are relevant matters to be considered when assessing the nature of the household.
31. There is no evidence before the Tribunal that the parties have any children together. The applicant has three children from her previous marriage. Her two daughters are secondary applicants for this visa. The sponsor has a son and a daughter from a previous marriage. As mentioned above, the applicant's two daughters live with the parties.
32. In independent and consistent evidence, the parties told the hearing that the sponsor's children welcome the parties' relationship; however, they only see the children on special occasions. The applicant stated that this is because the children live with their mother and both parties told the hearing that the applicant is invited to celebrate special occasions with them.
33. In a statutory declaration dated 2 October 2018, the sponsor's son Quang Minh Vo states that the sponsor and the applicant and her daughters joined in celebrations for his twenty-first birthday in 2018 and he also celebrates Father's Day with them.

34. In independent and consistent evidence to the Tribunal, the parties told the hearing that the sponsor does most of the main household chores, but the applicant always cooks.
35. In independent and consistent evidence to the Tribunal the parties told the hearing that, during COVID lockdowns, the sponsor's employment continued, but the applicant was unable to work and had a 'good holiday'.
36. As mentioned above the parties provided the Tribunal with copies of tax returns dating from 2019 to 2023, showing that each had declared the other as spouse, and showing their joint address. They also provided utilities invoices in joint names for their shared rental home in Main Road St Albans as well as for their jointly purchased home in Oakden Street St Albans.
37. The Tribunal notes the evidence provided at the time of application, which included utilities invoices in joint names and a tenancy agreement for the rental property at Main Road St Albans and gives some weight to this evidence.
38. The Tribunal also gives some weight to the evidence provided to it at the time of this decision as evidence of the nature of the household.

39. *The social aspects of the relationship*

40. Whether the persons represent themselves to other people as being in a spousal relationship, the opinion of the persons' friends and acquaintances about the nature of the relationship and any basis on which the persons plan and undertake joint social activities are relevant matters to be considered in determining the social aspects of the relationship.
41. The parties provided a number of dated and labelled photographs of the parties socialising with friends as well as travelling together within Australia and to Vietnam. When visiting Vietnam, the parties have met with each other's families and attended a number of events.
42. The applicant told the hearing that the parties like to meet with friends for dinner or parties, 'not every week, just sometimes'. The sponsor told the hearing the parties like shopping together and sometimes meet with friends on weekends.
43. In her evidence to the Tribunal, the applicant's daughter Y Nhi Huynh told the hearing that the parties 'do everything together'.
44. In a statutory declaration dated 15 September 2018, a friend of the sponsor Khanh Duy Le states that the applicant has made the sponsor very happy and that the parties are planning to purchase a home together. The Tribunal notes that the parties purchased a home in July 2021.
45. The Tribunal notes the 'limited' evidence provided at the time of application and gives little weight to this 'limited' evidence.
46. At the time of its decision, the Tribunal gives some weight to the evidence provided to it in regard to the social aspects of the relationship.

47. *The nature of the persons' commitment to each other*

48. The duration of the relationship, the length of time during which the persons have lived together, the degree of companionship and emotional support that the persons draw from each other, and whether the persons see their relationship as long-term are all aspects to be considered in determining the nature of the persons' commitment to each other.

49. The parties were married on 18 April 2018 and, at the time of application, had been married for approximately five months. At the time of this decision the parties have been married for more than five years and the Tribunal gives great weight to this length of time.
50. The Tribunal notes that the parties have travelled together within Australia and to Vietnam, meeting each other's families, and travelling with the applicant's daughters.
51. The Tribunal also notes the parties' earlier commitment to saving for a home and, later, making the purchase in July 2021 and gives this great weight as evidence of their commitment to a long-term relationship. The parties told the Tribunal that they plan to live in the home they purchased in 2021 for a 'long time'.
52. The parties told the Tribunal hearing that they provide support to each other. The applicant stated that the sponsor has taken care of her when she is ill, and the applicant stated that the parties share their feelings and 'encourage' each other.
53. The applicant's daughter, Ms Huynh stated that the parties have a 'good relationship'.
54. The Tribunal notes that, at the time of application, the delegate was concerned that the parties had met while the applicant was still married to her first husband, and the development of the relationship had been rapid; however, the Tribunal also notes that, at the time of this decision, the parties have remained living together, have travelled during this time as a family with the applicant's daughters and have purchased a home together. The Tribunal gives great weight to the evidence regarding the nature of the parties' commitment to each other.

55. Conclusion

56. As stated above, the Tribunal is satisfied that the parties are validly married, as required by s 5F(2)(a) of the Act.
57. After considering all the evidence before it and for the reasons given with respect to the reg 1.15A(3) matters, the Tribunal is satisfied that, both at the time of application on 17 September 2018 and at the time of this decision, the applicant and the sponsor:
- had and have a mutual commitment to a shared life as wife and husband to the exclusion of all others, as required by s 5F(2)(b) of the Act;
 - had and have a genuine and continuing relationship, as required by s 5F(2)(c) of the Act; and
 - lived and live together as much as possible as required by s 5F(2)(d)(i) of the Act.
58. On the basis of the above the Tribunal is satisfied that the requirements of s 5F(2) are met at the time the visa application was made and at the time of this decision.
59. Therefore the applicant meets cls 820.211(2)(a) and cl 820.221.
60. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

61. Secondary applicants

62. In circumstances where members of a family unit make a combined application, only one member of the family needs to satisfy the primary criteria. In the delegate's decision dated 6

March 2020, the delegate stated that neither the primary nor the secondary applicants met the requirements to grant a Partner (Temporary) (Class UK) (subclass 820) visa.

63. As the delegate of the Minister found that the visa applicant did not meet the primary criteria for the grant of the visa the delegate did not assess whether the secondary applicants met the secondary criteria for the grant of their secondary visa. The delegate's refusal to grant a Partner visa to the secondary applicants was a consequential decision of the delegate's decision to refuse to grant the visa applicant a partner visa (subclass 820) and the individual circumstances were not considered by the delegate.
64. In those circumstances and given the findings above of the Tribunal in relation to the primary visa applicant, is appropriate for the Tribunal to remit the visa application of the secondary visa applicants to the Minister for reconsideration on the basis of the direction given for the primary visa applicant so the secondary visa applications can be assessed against the secondary criteria.

DECISION

65. The Tribunal remits the applications for Partner (Temporary) (Class UK) visas, with the direction that the first named applicant meets the following criteria for a Subclass 820 (Partner) visa:
 - cl 820.211(2)(a) of Schedule 2 to the Regulations
 - cl 820.221 of Schedule 2 to the Regulations

Cheryl Cartwright
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).